

Form and Correctness Approved: *BAP*

Contents Approved:

By: _____
Office of the City AttorneyBy: _____
DEPT. Development

NORFOLK, VIRGINIA

Ordinance No. 48633

AN ORDINANCE GRANTING MARLENE SCHOFIELD PERMISSION TO ENCROACH INTO THE RIGHT-OF-WAY AT 1408 COLLEY AVENUE FOR THE PURPOSE OF OUTDOOR DINING AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

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BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and conditions of the Encroachment Agreement between the City of Norfolk and Marlene Schofield ("Schofield"), a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to Schofield to encroach into the right-of-way at 1408 Colley Avenue for the purpose of outdoor dining and for no other purpose.

Section 2:- That the City Manager and other proper officers of the City are hereby authorized to execute the Encroachment Agreement and do all things necessary for its implementation.

Section 3:- That the City Manager is further authorized to correct, amend or revise the Encroachment Agreement as he may deem advisable consistent with the intent of the Council as expressed therein.

Section 4:- That this ordinance shall be in effect from and after its adoption.

Attachment:

Exhibit A - Encroachment Agreement (14 pages)

Adopted by Council January 25, 2022
Effective January 25, 2022

TRUE COPY
TESTE:

RICHARD ALLAN BULL

BY:

CHIEF DEPUTY CITY CLERK

ENCROACHMENT AGREEMENT

This **ENCROACHMENT AGREEMENT** ("Agreement") is made and entered into this ____ day of _____, 2021, by and between the **CITY OF NORFOLK**, a municipal corporation of the Commonwealth of Virginia ("City"), and **MARLENE SCHOFIELD**, an individual ("Schofield"), whose address is 2769 Einstein Drive, Virginia Beach, Virginia 23456.

WITNESSETH:

1. **ENCROACHMENT AREA:** City hereby grants permission to Schofield to encroach into the right-of-way at 1408 Colley Avenue approximately 352 +/- square feet, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of outdoor dining and for no other purpose.

2. **USE:** Schofield and her tenant(s), if any, shall be permitted to occupy the Encroachment Area for outdoor dining purposes in conjunction with the operation of a dining establishment.

3. **TERM; TERMINATION:** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on February 1, 2022, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on January 31, 2027. However, it is expressly understood that the permission granted herein is subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Schofield, and her tenant(s), if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.

4. **COMPENSATION:** As compensation for the privilege of encroaching into the right-of-way, Schofield shall pay City an annual encroachment fee in the amount of Two Thousand One Hundred Twelve and 00/100 Dollars (\$2,112.00) to be paid in monthly installments of One Hundred Seventy-Six and 00/100 Dollars (**\$176.00**), beginning on the 1st day of February, 2022.

The encroachment fee shall be paid by check payable to the “Norfolk City Treasurer” and sent to the Department of Economic Development, 999 Waterside Drive, Suite 2430, Norfolk, Virginia 23510, Attention: Director.

5. **LATE FEES:** For any late payments received fifteen (15) days after the first of each month, Schofield shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES:** City shall not be responsible for utilities of any type used within the Encroachment Area. Schofield shall pay all utility meter and utility services charges for all utilities, including but not limited to, gas, electricity, water, telephone, sewer, and any other utilities necessary to serve the Encroachment Area.

7. **REPAIRS:** Schofield, and her tenant(s), shall keep and maintain the Encroachment Area in good and complete state of repair and condition. Schofield, and her tenant(s), shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and competent manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

8. **REQUIREMENTS OF PUBLIC LAWS:** Schofield, and her tenant(s), shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state, and municipal laws, ordinances and regulations applicable to the structure, use, and occupancy of the Encroachment Area. In addition, Schofield, and her tenant(s), shall be responsible for the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **RIGHT TO ENTER AND CURE:** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining

compliance with this Agreement, and making any repairs, which City deems necessary because of any failure of Schofield, and/or her tenant(s), to meet their obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area for cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Schofield's, and/or her tenant(s)', default in making repairs.

10. **NOTICE:** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City: Office of Economic Development
Attn: Director
999 Waterside Drive, Suite 2430
Norfolk, Virginia 23510

Schofield: Marlene Schofield
2769 Einstein Drive
Virginia Beach, Virginia 23456

With copies to: City Attorney
810 Union Street, Suite 900
Norfolk, Virginia 23510

Either party hereto may change their address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **DESTRUCTION:** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

12. **NON-LIABILITY OF CITY:** City shall not be liable for any damage or injury which may be sustained by Schofield, her tenant(s), or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, hearing or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements, or resulting from acts, conduct or omissions on the part of Schofield, her tenant(s), or her agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

13. **REMOVAL OF SNOW:** Schofield, and her tenant(s), agree to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

14. **ALTERATIONS:** Schofield, and her tenant(s), covenant and agree that they will not make any improvements, changes installations, renovations, additions, or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Design Review Committee and Norfolk's Planning Commission. If Schofield, and/or her tenant(s), install or make any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Schofield, and her tenant(s), hereby agree to remove, if requested by City, any improvements, additions, installations, and renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event Schofield, and/or her tenant(s), fail to remove the improvements, additions, installations, renovations, and changes on or to the Encroachment Area when requested to do so by City, then the City may remove the improvements, additions, installations, renovations, and changes. Schofield, and her tenant(s), shall be jointly and severally liable for paying for the cost of such removal.

15. **ASSIGNMENT AND SUBLETTING:** City and Schofield agree that the permission to encroach granted hereby is for the benefit of Schofield and her tenant(s) and may not be assigned by Schofield without express authorization by the City. Further, upon Schofield's lease of the premises to a tenant, Schofield shall have any such tenant execute a copy of this Agreement, acknowledging acceptance of the terms and conditions set forth herein.

16. **SURRENDER:** Schofield, and her tenant(s), will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Schofield, and her tenant(s), shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Schofield's use of the Encroachment Area. If Schofield, and her tenant(s), have been requested to remove and fail to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Schofield, and her tenant(s), shall be jointly and severally liable to City for the cost of any removal and disposal.

17. **INSURANCE:** Schofield, and/or her tenant(s), shall maintain in full force and effect Commercial General Liability ("CGL") insurance with a combined single limit policy of bodily injury, death and property damage insurance of One Million and 0/100 Dollars (\$1,000,000) per occurrence and Two Million and 0/100 Dollars (\$2,000,000) general aggregate insuring against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas. CGL insurance shall be written on an approved ISO form for coverage in the Commonwealth of Virginia, and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury, and liability assumed under insured contract. The City, her officers, employees, agents and representatives shall be named as additional insured on any such policy. Coverage shall be evidenced by a Certificate of Insurance provided to the City within thirty (30) days after adoption of this Agreement. All

insurance policies and certificates shall provide for thirty (30) days advance notice in writing to City if the insurance is cancelled or modified. Schofield, and her tenant(s), shall inform the City Attorney and the Department of Real Estate within fifteen (15) days of receiving such notice or cancellation, and immediately obtain coverage compliant with this agreement.

Further, Schofield, and her tenant(s), shall maintain the applicable statutory Workers' Compensation Insurance, and Employer's Liability Insurance with a limit of at least Five Hundred Thousand and 0/100 Dollars (\$500,000) per accident/disease, and policy limit of Five Hundred Thousand and 0/100 Dollars (\$500,000) covering any of Schofield's employees, as well as her tenant's employees, whose work occurs within the premises which are subject to this agreement.

18. **INDEMNIFICATION:** Schofield, and her tenant(s), shall indemnify and save harmless City from all fines, penalties, costs, suits, proceedings, liabilities, damages, claims and actions of any kind arising out of the use and occupation of the Premises by reason of any breach or nonperformance of any covenant or condition of this Agreement by Schofield, or her tenant(s), or by Schofield's, or her tenant(s)', intentional act or negligence, and not caused in whole or in part by City. This indemnification shall extend to all claims of any person or party for death or injury to persons and damage to any property, and to legal expenses, including reasonable attorney's fees, incurred by City in the defense of such claims or incurred by City as a result of a breach of any provision of this Agreement by Schofield, and/or her tenant(s), but does not extend to circumstances caused in whole or in part by City.

19. **FIXTURES:** City covenants and agrees that no part of the improvements constructed, erected or placed by Schofield, or her tenant(s), in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Schofield, and her tenant(s), to covenant and agree that all improvements of every kind

and nature constructed, erected or placed by Schofield, and/or her tenant(s), in the Encroachment Area shall be and remain the property of Schofield, and/or her tenant(s), unless such improvements are not removed upon termination of this Agreement.

20. **ENVIRONMENTAL:**

(a) For purposes of this section:

(i) “Hazardous Substances” include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. § 6901 et seq.) (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.) (CERCLA) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) “Release” means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing, or dumping.

(iii) “Notice” means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPA) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the “environment,” as such terms are defined in CERCLA. “Notice” shall include the imposition of any lien on any real property, personal property or revenues of Schofield, and/or her tenant(s), including but not limited to the Schofield’s, or her tenant(s)’, interest in the Encroachment Area or any of Schofield’s, and/or her tenant(s), property located thereon, or any

violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Schofield, and her tenant(s), may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Schofield, and her tenant(s), shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Schofield, and her tenant(s), shall not cause or permit, because of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Schofield, and her tenant(s), shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) Schofield, and her tenant(s), shall comply with all applicable federal, state, and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with all permits required thereunder, as well as under any successor or new environmental laws. Upon the receipt of any Notice, Schofield, and her tenant(s), shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this section shall apply to any successor in interest to Schofield, and/or her tenant(s), whether due to merger, sale of assets or other business combination or change of control.

(e) Schofield, and her tenant(s), hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims,

losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from Schofield's, and/or her tenant(s), failure to comply strictly with the provisions of this section. The provisions of this section shall survive the termination of this permission granted by this Agreement.

(f) City agrees that Schofield shall not be responsible or liable for environmental conditions existing on or about the Encroachment Area prior to the occupancy by Schofield and/or her tenant(s).

21. **LIENS OR ENCUMBRANCES:** If because of any act or omission of Schofield, and/or her tenant(s), any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Schofield, and her tenant(s), shall, at their own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Schofield, and/or her tenant(s), of the filing thereof, and Schofield, and/or her tenant(s), shall have the right to contest the validity of such lien if they so choose.

22. **APPLICABLE LAW:** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in Norfolk, Virginia.

23. **WAIVER OF TRIAL BY JURY:** To the extent permitted by law, City and Schofield, and her tenant(s), mutually waive their rights to trial by jury in any action, proceeding, or counterclaim brought by either party against the other with respect to any dispute or claim

arising out of the permission to encroach granted to Schofield, and her tenant(s), by this Agreement.

24. **OTHER REQUIREMENTS:**

(a) Schofield, and her tenant(s), shall comply with the City of Norfolk's Outdoor Dining Policy, as amended from time to time.

(b) Schofield, and her tenant(s), shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(d) Schofield's, and her tenant(s)', use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

(e) A trashcan compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.

(f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee.

25. **TITLES AND HEADINGS:** Titles and headings are inserted in this Agreement for reference purposes only and shall not be used to interpret the Agreement.

26. **SEVERABILITY:** Each provision of this Agreement must be interpreted in a way that is valid under applicable law. In the event that any provision or portion of this Agreement is determined by a court of competent jurisdiction to be void, invalid, or otherwise unenforceable, such provision or portion shall be deemed reformed, insofar as is possible, to cure the defect and give maximum effect to the intent of the City and Schofield, and her tenant(s), entering into this Agreement, and in any event the remainder of the Agreement shall continue in full force and effect.

27. **ENTIRE UNDERSTANDING:** This Agreement constitutes the entire understanding between or on behalf of the City and Schofield, and her tenant(s), and supersedes any prior understandings and/or written or oral agreements between them or on their behalf respecting the subject matter herein. There are no representations, agreements, arrangements, or understandings, oral or written, between and among the parties hereto relating to the subject matter of this Agreement, which are not fully expressed herein.

This Agreement may be modified or amended only by a writing signed and dated by both parties. All amendments shall be incorporated and made a part of this Agreement and attached hereto.

28. **AMENDMENTS:** This Agreement may be modified or amended only by a writing signed and dated by all parties. All amendments shall be incorporated and made a part of this Agreement and attached hereto.

29. **SUCCESSORS AND ASSIGNS:** In the event Schofield assigns, conveys, sells, or otherwise disposes of their interest in the property located at 1408 Colley Avenue to a party other than an affiliated entity, the permission granted by this Agreement shall immediately terminate. Any such successor in interest to Schofield that desires to encroach into the right-of-way must submit a new application for approval by the City.

30. **COMPLIANCE WITH FEDERAL IMMIGRATION LAW:** At all times during which any term of this Agreement is in effect, Schofield nor her tenant(s) shall not knowingly employ any unauthorized alien. For purposes of this section, an “unauthorized alien” shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed either by Title 8, Section 1324a of the United States Code or the U.S. Attorney General.

31. **AUTHORITY TO EXECUTE:** The terms of this Agreement are contractual and not mere recital, and the individuals executing this Agreement hereby represent and warrant that they have full and complete authority to covenant and agree as herein provided and to execute this Agreement on behalf of the parties hereto.

32. **COUNTERPARTS:** The Agreement may be signed in counterparts. The parties hereto agree that facsimile or email signatures shall have the full force and effect of original signatures.

IN WITNESS WHEREOF, the parties hereto have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

MARLENE SCHOFIELD

CITY OF NORFOLK

By: _____
City Manager

Attest:

City Clerk

Approved as to Contents:

Director of Economic Development

Approved as to Form and Correctness

Assistant City Attorney

Tenant Endorsement and Acceptance:

By: _____

Name (Printed): _____

Title: _____

